**WOODSVILLE SDN BHD**

**v.**

**TIEN IK ENTERPRISES SDN BHD & ORS AND OTHER APPEALS**

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
HASAN LAH JCA
SULONG MATJERAIE JCA
[APPEAL NO: W-02-438-2000]
13 APRIL 2009

***CIVIL PROCEDURE:*** *Appeal - Fresh evidence - Admission of - Whether reasonable diligence would have made new evidence available at first instance - Whether fresh evidence would have had a determining influence upon decision at first instance - Admission of fresh evidence disallowed - Rule 7(3A) Rules of the Court of Appeal 1994*

***EVIDENCE:*** *Fresh or further evidence - Admission of, on appeal - Whether reasonable diligence would have made new evidence available at first instance - Whether fresh evidence would have had a determining influence upon decision at first instance - Admission of fresh evidence disallowed - Rule 7(3A) Rules of the Court of Appeal 1994*

Four companies were wound up by the High Court on 3 June 1994. The appellant applied to remove the common liquidators of the four companies ('the removal application'), *inter alia*, on the grounds that the liquidators had failed to exercise their duty to investigate the affairs of the four companies and to collect and realise the assets of the four companies. On 31 May 2000 the High Court dismissed the removal application and on 26 June 2000 the appellant appealed against the decision. The appellant applied by way of notice of motion for leave to adduce fresh evidence in the form of an affidavit affirmed on 12 December 2001 by Gong Wee Ning ('GWN's affidavit'), one of the liquidators. The appellant now sought to adduce this affidavit to show that the liquidators had discovered that Tanjong Tin Dredging (Malaysia) Sdn. Bhd. ('TTDM') was the beneficial owner of three pieces of land located at Tanjong Tualang ('the said lands') and that they were beneficially owned by a subsidiary of one of the Companies under Winding Up and that this discovery was made not later than 11 December 1998. As GWN's affidavit was

affirmed on 12 December 2001 which was more than 18 months after the decision of the High Court on 31 May 2000, the issue to be decided was whether the new evidence could be given without leave of court and as a matter of right pursuant to s. 69(2) of the Court of Judicature Act 1964. Counsel for the respondents submitted that the appellant has to satisfy the conditions stated under r. 7(3A) of the Rules of the Court of Appeal 1994 ('RCA').

**Held (dismissing the application with costs)**
**Per Hasan Lah JCA:**

**(1)** In view of the majority decision in *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan*, the court disagreed with the appellant's submission that the appellant's application should be allowed as of right. The appellant had to satisfy the conditions as stated in r. 7(3A) of the RCA. (para 24)

**(2)** The first condition is that, at the hearing before the High Court the new evidence must have been not available to the appellant or that reasonable diligence would not have made it so available. The appellant had the legal and evidential burdens to satisfy the court that the information relating to the beneficial ownership of the said lands could not have been obtained with reasonable diligence for use at the hearing of the removal application. The appellant failed to explain why they did not provide the information relating to the beneficial ownership of the said lands to the learned High Court Judge before the decision was delivered. The appellant should have exercised reasonable diligence and applied for leave of the High Court to file an affidavit in respect of the said lands before the High Court's judgment was delivered. As the evidence relating to the said lands was in possession of the appellant before judgment in the removal case was delivered it would be wrong to exercise the court's discretion in favour of the appellant. The appellant had not satisfied the first condition to r. 7(3A) of the RCA. (paras 25 & 28)

**(3)** As for the second condition, the appellant had to show that the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court. The issue relating to the said lands was one of the twelve complaints raised by the appellant to the

liquidators which had been considered by the learned High Court Judge. The issue for determination by the High Court was whether the liquidators had reasonably investigated the matter at the time of the complaint. As such the fresh evidence sought to be adduced would have had no determining influence on the High Court decision as it would not have detracted from the finding that the liquidators had discharged their duties in investigating the same. Further, TTDM was not one of the companies in liquidation. The removal application involved four companies. The fresh evidence sought to be adduced only concerned one of the four companies which owned shares in TTDM. (paras 29 & 33)

***Bahasa Malaysia*** *Translation Of Headnotes*

Empat syarikat telah digulungkan oleh Mahkamah Tinggi pada 3 Jun 1994. Perayu memohon untuk menyingkirkan penyelesai-penyelesai bersama keempat-empat syarikat ('permohonan penyingkiran'), antara lain, atas alasan-alasan bahawa penyelesai-penyelesai gagal melaksanakan tugas mereka untuk menyiasat hal-hal keempat-empat syarikat dan untuk memungut dan menghasilkan aset-aset keempat-empat syarikat. Pada 31 Mei 2000 Mahkamah Tinggi menolak permohonan penyingkiran dan pada 26 Jun 2000 perayu merayu terhadap keputusan itu. Perayu memohon melalui notis usul menuntut kebenaran untuk mengemukakan keterangan baru dalam bentuk suatu afidavit yang telah diesahkan pada 12 Disember 2001 oleh Gong Wee Ning ('afidavit GWN'), salah seorang penyelesai. Perayu sekarang cuba mengemukakan afidavit ini untuk membuktikan bahawa penyelesai-penyelesai telah membuat pertemuan bahawa Tanjong Tin Dredging (Malaysia) Sdn Bhd ('TTDM') merupakan pemilik benefisial tiga bidang tanah yang terletak di Tanjong Tualang ('tanah tersebut') dan bahawa mereka dimiliki secara benefisial oleh subsidiari salah satu syarikat di bawah penggulungan dan bahawa penemuan ini dibuat sebelum 11 Disember 1998. Oleh kerana afidavit GWN telah diesahkan pada 12 Disember 2001 iaitu lebih dari 18 bulan selepas keputusan Mahkamah Tinggi pada 31 Mei 2000, isu yang perlu ditentukan ialah sama ada keterangan baru boleh diberi tanpa kebenaran mahkamah dan mengikut hak menerusi s. 69(2) Akta Mahkamah Kehakiman 1964. Peguam untuk responden-responden menghujah bahawa perayu mesti memenuhi syarat-syarat yang dinyatakan di bawah k. 7(3A) Kaedah-kaedah Mahkamah Rayuan 1994 ('KMR').

**Diputuskan (menolak permohonan dengan kos)**
**Oleh Hasan Lah HMR:**

**(1)** Memandangkan keputusan majoriti dalam *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan*, mahkamah ini tidak bersetuju dengan hujahan perayu bahawa permohonan perayu mesti dibenarkan mengikut hak. Perayu mesti memenuhi syarat-syarat seperti yang dinyatakan dalam k. 7(3A) KMR.

**(2)** Syarat pertama ialah, pada perbicaraan di hadapan Mahkamah Tinggi keterangan baru mesti tidak disediakan untuk perayu atau ketekunan munasabah tidak boleh menjadikannya sebegitu. Perayu mempunyai beban undang-undang dan keterangan untuk memuaskan mahkamah bahawa informasi yang berkaitan dengan milikan benefisial tanah tersebut tidak dapat diperolehi dengan ketekunan munasabah untuk digunakan pada perbicaraan permohonan penyingkiran. Perayu gagal menerangkan mengapa mereka tidak menyediakan informasi berkaitan dengan milikan benefisial tanah tersebut kepada Yang Arif Hakim Mahkamah Tinggi sebelum keputusan itu disampaikan. Perayu sepatutnya menggunakan ketekunan munasabah dan memohon kebenaran Mahkamah Tinggi untuk memfail suatu afidavit berhubung dengan tanah tersebut sebelum penghakiman Mahkamah Tinggi disampaikan. Oleh kerana keterangan berhubung dengan tanah tersebut adalah dalam milikan perayu sebelun penghakiman dalam kes penyingkiran telah disampaikan ia akan tidak betul untuk melaksanakan budi bicara mahkamah dalam pihak perayu. Perayu tidak memuaskan syarat pertama kepada k. 7(3A) KMR.

**(3)** Untuk syarat kedua, perayu mesti menunjukkan bahawa keterangan baru, jika benar, akan atau mungkin akan mempunyai pengaruh penentuan atas keputusan Mahkamah Tinggi. Isu yang berkaitan dengan Tanah tersebut merupakan salah satu daripada 12 aduan yang dibangkitkan oleh perayu kepada penyelesai-penyelesai yang telah ditimbangkan oleh Hakim Mahkamah Tinggi. Isu untuk ditentukan oleh Mahkamah Tinggi ialah sama ada penyelesai-penyelesai telah menyiasat dengan munasabah perkara pada masa aduan itu. Oleh yang demikian keterangan baru yang ingin dikemukakan tidak akan mempunyai pengaruh penentuan atas keputusan Mahkamah Tinggi kerana ia tidak akan mengurangkan dari

penemuan bahawa penyelesai-penyelesai telah melepaskan tugas-tugas mereka dalam menyiasat yang sama. Lagipun, TTDM bukan salah satu syarikat dalam penyelesaian. Permohonan penyingkiran melibatkan empat syarikat. Keterangan baru yang ingin dikemukakan hanya melibatkan satu daripada empat syarikat-syarikat yang mempunyai syer-syer dalam TTDM.

**Case(s) referred to:**

*Mid Valley City Sdn Bhd & Anor v. Akitek Tenggara Sdn Bhd [2002] 4 CLJ 286 CA* ***(refd)***

*Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan [2004] 4 CLJ 35 CA* ***(refd)***

*Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor [1997] 1 CLJ 529 FC* ***(refd)***

*Vernon v. Bosley [1996] 3 WLR 683* ***(refd)***

**Legislation referred to:**

Companies Act 1965, s. 232(1)

Courts of Judicature Act 1964, s. 69(2), (3)

Rules of the Court of Appeal 1994, r. 7(2), (3), (3A)(b)

*For the appellant - Lim Lian Leong (Ong Chee Kwan with him); M/s Lee Ong & Kandiah*

*For the 1st respondent - Kumar Kanagasingam (Andrew Chie with him); M/s Lee Hishammuddin Allen & Gledhill*

*For the 2nd-5th respondents - N Nagarajah (Sudesh Singh with him); M/s Shook Lin & Bok*

*[Appeals from High Court, Kuala Lumpur; Companies Winding-Up Nos: D2-28-187-1990, D2-28-192-1990, D2-28-197-1990 & D2-28-202-1990.]*

*Reported by Amutha Suppayah*

## JUDGMENT

**Hasan Lah JCA:**

**[1]** This is the appellant's (the petitioner in the court below) application by way of notice of motion in encl. 32a for, *inter alia*, leave to adduce fresh evidence in the form of an affidavit affirmed on 12 December 2001 by Mr. Gong Wee Ning ("GWN's affidavit"), one of the liquidators/first respondent, for appeal by the appellant ("this appeal") against the High Court's decision given on 31 May 2000 and for leave to to make consequential amendment to the memorandum of appeal.

**[2]** We heard this application on 13 May 2008 and we were unanimous in our decision in dismissing the application. We now give the reasons for our decision.

**[3]** The background facts may be stated as follows. The following four companies have been wound up by the Kuala Lumpur High Court on 3 June 1994:

(a) Tien Ik Enterprises Sdn Bhd ("TIESB");

(b) Tien Ik Credit Sdn Bhd ("TICSB");

(c) Giltspur Holdings Sdn Bhd ("GHSB"); and

(d) Tien Ik Sdn Bhd ("TISB").

**[4]** The appellant applied to remove the common liquidators of the four companies involved under s. 232(1) of the Companies Act 1965 ("the removal application") on the following grounds:

(a) the liquidators' alleged failure to exercise their duty to investigate the affairs of the four companies;

(b) the liquidators' alleged failure to collect and realise the assets of the four companies;

(c) the liquidators' alleged misdirection and misconception of their powers and duties; and

(d) the liquidators' alleged failure to maintain a proper record of the liquidation and incompetence in the discharge of their duties.

**[5]** On 31 May 2000 the High Court dismissed the removal application and on 26 June 2000 the appellant filed this appeal.

**[6]** In GWN's affidavit he stated in para 16 that:

> 16 In response to paragraphs 17 to 20 of the Petitioner's Affidavit, I verily state as follow:
>
> (a) In respect of the Removal application, I only affirmed 2 Affidavits, the first on 25.8.1998 and the second on 21.10.1998 (hereinafter referred to as "my 1st Affidavit" and "my 2nd Affidavit" respectively);

(b) I verily state that when I affirmed my 1st Affidavit and 2nd Affidavit on 25.8.1998 and 21.10.1998 respectively, I did not know that TTDM was the beneficial owner of the 3 pieces of land located at Tanjong Tualang (hereinafter referred to as the "Tanjong Tualang Lands"). This is based on the investigations carried out as well as the following documents:

(i) the result of the company search of TTDM dated 25.7.1995 which was exhibited in my 1st Affidavit and marked as "GWN-15" which did not show that the Tanjong Tualang lands belonged to the company;

(ii) the result of the company search of TTDM dated 6.5.1998 which was exhibited in my 2nd Affidavit and marked as "GWN-27" which did not show that the Tanjong Tualang lands belonged to the company; and

(iii) the result of the land search in respect of the Tanjong Tualang Land dated 16.10.1998 which was exhibited in my 2nd Affidavit and marked as "GWN-28" which showed that in fact, the Tanjong Tualang lands were owned by Tanjong Tin Dredging Limited.

(c) However, in early November 1998, I received a telephone call from the 2nd Respondent who informed me that TTDM was the beneficial owner of the Tanjong Tualang Lands. This conversation was confirmed by me in a letter to the 2nd Respondent dated 5.11.1998. In my said letter, I informed the 2nd Respondent that from recent land searches, the Tanjong Tualang lands are still registered under Tanjong Tin Dredging Limited. As such, I had requested that the 2nd Respondent arrange for the transfer of the Tanjong Tualang lands to TTDM. A copy of the said letter is produced and shown to me and its exhibited herein and marked as "GWN-1";

(d) As I did not receive a reply to my aforesaid letter, I wrote a second letter to TTDM dated 7.12.1998. A copy of the second letter is produced and shown to me and is exhibited herein and marked as "GWN-2";

(e) I verily state that TTDM only replied my aforesaid letters via a letter dated 11.12.1998 enclosing the original titles of the Tanjong Tualang lands. A copy of TTDM's letter is produced and shown to me and is exhibited herein and marked as "GWN-3". Therefore, I verily state that it was only on receipt of TTDM's letter that I was able to confirm that TTDM was the beneficial owner of the Tanjong Tualang lands;

A (f) Thereafter, I instructed my then solicitors, Messrs. Lee Hishammuddin that I was informed and was only able to confirm on 11.12.1998 that TTDM was the beneficial owner of the Tanjong Tualang lands. I verily state that my then solicitors advised me that the beneficial ownership of the
B Tanjong Tualang lands was not a material issue and not relevant before this Honourable Court in the Removal application and it was therefore not necessary for me to disclose the same to this Honourable Court;

(g) As such, based on the said advice from my then solicitors,
C I did not affirm any further Affidavit.

**[7]** The appellant filed the present application on 26 June 2000. It was supported by an affidavit affirmed by Kuok Khoon Hwong ("KKH's affidavit"), a director of the appellant. The grounds of
D the application may be summarised as follows:

(a) The new evidence is GWN's affidavit which was filed in the High Court under Winding Up No: D2-28-187-1990.

(b) In his affidavit Gong Wee Ning admitted that the liquidators
E had discovered that certain immoveable properties, namely the Tanjong Tualang lands existed, that they were beneficially owned by a subsidiary of one of the Companies under Winding Up and that this discovery was made not later than 11 December 1998. Gong Wee Ning also admitted that the
F liquidators deliberately chose not to inform the court of this discovery.

(c) This is a significant admission as in the course of the proceedings to remove the liquidators which are presently being appealed, the appellants alleged that the liquidators had
G failed to investigate the ownership of the Tanjong Tualang lands but the liquidators claimed that they had investigated and found no evidence of the Tanjong Tualang lands.

(d) In his judgment, the learned High Court Judge accepted the
H liquidators' evidence and was clearly influenced against the appellants. Indeed the learned High Court Judge referred to the petitioners' insistence that the Tanjong Tualang lands existed several times and in the context of being unreasonable and "against revealed facts".

I

(e) If the liquidators had informed the learned High Court Judge of their discovery that the Tanjong Tualang lands in fact existed this would have corrected the serious misapprehension that the appellant was acting unreasonably and would have fundamentally altered the learned High Court Judges appreciation of the appellants.

(f) Gong Wee Ning made the admission of his knowledge in the affidavit which is the new evidence sought to be admitted after the decision being appealed from and hence the new evidence could not have been obtained before the decision.

(g) The additional ground proposed is necessary given the existence of the new evidence disclosed in GWN's affidavit.

(h) By reason of the aforesaid the additional ground based on the aforesaid additional evidence has a high likelihood of influencing the decision in respect of the appellant's application for removal of the liquidators and the hearing of this appeal.

(i) The said additional evidence is relevant and credible.

**[8]** All the respondents opposed the application. Gong Wee Ning affirmed an affidavit-in-reply for the 1st respondent and Wong Heng Khong affirmed an affidavit-in-reply for the 2nd to 5th respondents.

**[9]** Learned counsel for the appellant submitted that the significance of the liquidators' admission of discovery and knowledge before the delivery of the High Court judgment is as follows:

(a) the fact that the liquidators were wrong on the Tanjong Tualang lands' ownership based on their nominal investigation speaks for itself on the liquidators' competency in discharging their duty to investigate the affairs of the Companies and their duty to locate the Companies' assets;

(b) the liquidators continued to mislead the court into believing that their investigation was properly conducted and that the appellant/Peter Kuok's claims were baseless by concealing their discovery;

(c) the liquidators knew that the evidence given during the hearing did not represent the true position and that there was a risk that judgement would be given on a basis that was no longer true;

(d) the liquidators have successfully 'colored" the court's perception of the Appellant/Peter Kuok's character as a result of the liquidators' willful omission of material facts;

(e) the High Court did not have the benefit of the truth of the Tanjong Tualang lands' ownership and the correctness of the appellant/Peter Kuok's claims;

(f) the liquidators have breached their legal and ethical duties as officers of the court;

**[10]** It is the contention of the appellant's counsel that under s. 69(2) of the Courts of Judicature Act 1964 and r. 7(2) Rules of the Court of Appeal 1994 GWN's affidavit should be admitted as a matter of course since this affidavit was affirmed after this appeal was filed. However, the appellant was directed by the Court of Appeal to file an application for leave together with the application to amend the memorandum of appeal as a matter of formality.

**[11]** With regard to the application to amend the memorandum of appeal he submitted that it would only be consequential to the inclusion of GWN's affidavit as fresh evidence.

**[12]** In his submission learned counsel for the appellant cited the case of *Mid Valley City Sdn Bhd & Anor v. Akitek Tenggara Sdn Bhd* [2002] 4 CLJ 286 and *Vernon v. Bosley* [1996] 3 WLR 683.

**[13]** In response to that learned counsel for the 2nd to 5th respondents submitted that the fresh evidence sought to be adduced could have been obtained if reasonable diligence had been exercised by the appellant. The liquidators' knowledge of the ownership of the Tanjong Tualang lands concerned an event which transpired in 1998, whereas the High Court judgment was only delivered on 31 May 2000.

**[14]** Learned counsel for the 2nd to 5th respondents further submitted that this fresh evidence would not have had any influence on the result of the removal application. The issue that needs to be considered is whether the liquidators have reasonably

investigated the matter at the material time of the complaint to which the learned High Court judge found in the affirmative. The High Court reached its findings after having considered the various company and land searches conducted on Tanjong Tin Dredging (Malaysia) Sdn. Bhd. ("TTDM") by the liquidators. Even if it was shown that the liquidators were later aware of the property ownership of the Tanjong Tualang lands, it would not detract the finding that the liquidators had indeed discharged their duties in investigating the same.

**[15]** Learned counsel for the 1st respondent submitted that the appellant had known that the liquidators were aware of the Tanjong Tualang lands as early as April 2000. As such the appellant could have adduced that evidence to the High Court before the High Court delivered its decision in the removal application.

**[16]** Learned counsel for 1st respondent also contended that GWN's affidavit has no "determining influence" on the High Court judgment. He submitted that the test of "determining influence" in r. 7(3A)(b) of the Rules of the Court of Appeal 1994 is more stringent than the English Common Law test of "important influence".

**[17]** According to him the appellant did not raise the land ownership and concealment issues in the removal application before the High Court judge. The High Court judge never considered the land ownership issue in his judgment. Furthermore, the setting aside of committal proceedings by the winding-up High Court clearly showed that there was no concealment by the liquidators in respect of the land ownership issued. The removal applications concerned four companies and the land ownership and concealment issues only concerned one of the four companies, TIESB.

**[18]** Learned counsel for the 1st respondent also submitted that the liquidators should not be deprived of their right to have land ownership and concealment issues decided by the High Court. According to him s. 232(1) of the Companies Act 1965 confers a discretion on the winding-up High Court to decide whether to remove a liquidator or not.

**[19]** Finally, learned counsel for the 1st respondent submitted that the appellant has been guilty of inordinate delay in filing the application as this application was made more than five years and 3 1/2 months after the High Court's judgment.

**[20]** It is to be noted that the appellant made this application pursuant to s. 69(2) and (3) of the Courts of Judicature Act 1964 and r. 7(2) and (3) of the Rules of the Court of Appeal 1994. Section 69(2) and (3) of the Courts of Judicature Act 1964 provides:

> 69(1) ...
>
> (2) The further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, the further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court of Appeal.

Rule 7(2) and (3) of the Rules of the Court of Appeal 1994 provides:

> (2) Such further evidence may be given without leave on interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought.
>
> (3) Upon appeals from a judgment, after trial or hearing of any cause or matter upon the merits, such further evidence, save as to matters subsequent as aforesaid, shall be admitted on special grounds only, and not without leave of the Court.
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> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:
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> (a) At the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
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> (b) The new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court or the subordinate court, as the case may be.

**[21]** As GWN's affidavit was affirmed on 12 December 2001 which was more than 18 months after the decision of the High Court on 31 May 2000 the first issue to be decided is whether the new evidence could be given without leave of court and as a matter of right pursuant to s. 69(2) of the Courts of Judicature Act 1964. Counsel for the respondents submitted that the appellant has to satisfy the conditions stated under r. 7(3A) of the Rules of the Court of Appeal 1994.

**[22]** In *Sin Heap Lee-Marubeni Sdn Bhd v. Yip Shou Shan* [2004] 4 CLJ 35, the appellant sought to adduce fresh evidence at the appeal stage to show to the court that the damages suffered by the respondent could be minimised taking into consideration the alternative access road that was to be made available. The application was dismissed by a majority decision. Mokhtar Sidin JCA, speaking for the majority, said at p. 49:

> In order for the application to be allowed the appellant had to satisfy the conditions as stated in para 3A. There is no doubt in my mind that what the appellant attempted to produce was a happening after the facts ...

And at p. 53, the learned judge said:

> In my view, the application did not satisfy the conditions imposed by r. 7 of the Court of Appeal Rules. For that reason, by majority decision, we dismissed the application by the appellant.

**[23]** However, Abdul Aziz Mohamed JCA, in his dissenting judgment held at p. 76 that:

> The changes brought about by para (3A) have not been made to s. 69. Since para (3A) seeks to cling to r. 7, and since r. 7 has no existence, life or force of its own, but is merely an echo of s. 69, r. (3A) is nothing more but an attempt by subsidiary legislation to modify s 69. The attempt is *ultra vires* because subsidiary legislation is not capable of modifying an Act of Parliament, except by express authority of Parliament, which did not exist here.
>
> I was of the view, therefore, that s. 69 is not affected by para (3A) and further evidence as to post-decision matters may still be given, and as of right. Therefore, merely as a formality to dispel any doubt, leave should be given to the appellants to give the further evidence that they sought to give. The question of its weight and effect would be matters to be considered in the appeal itself.

**[24]** In view of the majority decision in *Sin Heap Lee- Marubeni Sdn. Bhd.*'s case we are unable to agree with the submission of learned counsel for the appellant that the appellant's application in the instant case should be allowed as of right. As such the appellant has to satisfy the conditions as stated in r. 7(3A) of the Rules of the Court of Appeal 1994.

**[25]** We will deal with the first condition first. It says that at the hearing before the High Court the new evidence was not available to the appellant or that reasonable diligence would not have made it so available.

**[26]** Learned counsel for the appellant said that the purpose of adducing GWN's affidavit is to show that the liquidators knew that TIESB owned the Tanjong Tualang lands through its subsidiary ("TTDM") since 11 December 1998 which was before the High Court delivered its judgment where the Tanjong Tualang lands were an issue.

**[27]** The judgment of the learned High Court judge was delivered on 31 May 2000 which was more than 18 months later. In para 7(b) of the 1st respondent's affidavit-in-reply, the 1st respondent averred that the appellant had knowledge of the contents of GWN's affidavit concerning the Tanjong Tualang lands as early as April 2000 and as such the appellant should have applied for leave of the High Court to file an affidavit in respect of the Tanjong Tualang lands before the judgment was delivered.

**[28]** It is to be noted that the appellant had not rebutted this material averment made by the 1st respondent by any affidavit. It is trite law that where a case is to be decided on a contest of affidavits, material allegations which are not contradicted are deemed to be admitted. (See *Sunrise Sdn Bhd v. First Profile (M) Sdn Bhd & Anor* [1997] 1 CLJ 529). The appellant has the legal and evidential burdens to satisfy this court that the information relating to the beneficial ownership of Tanjong Tualang lands could not have been obtained with reasonable diligence for use at the hearing of the removal application. The appellant failed to explain why they did not provide the information relating to the beneficial ownership of Tanjong Tualang lands to the learned High Court Judge before the decision was delivered. In our view the appellant should have exercised reasonable diligence and apply for leave of the High Court to file an affidavit in respect of Tanjong

Tualang lands before the High Court's judgment was delivered. As the evidence relating to Tanjong Tualang lands was in possession of the appellant before the judgment in the removal case was delivered it would be wrong for us to exercise our discretion in favour of the appellant. As such, we hold that the appellant has not satisfied the first condition to r. 7(3A) of the Rules of the Court of Appeal 1994.

**[29]** With regard to the second condition to the said rule, the appellant has to show that the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court.

**[30]** In para. 5, 6 and 7 of KKH's affidavit, the appellant averred as follows:

> 5. In the Appellant's application under Enclosure 108 which is the subject matter of this Appeal, the failure and or omission by the Liquidators to investigate the TTDM lands was one of the grounds relied upon by the Appellant in support of its application. In particular, at paragraph 63 of the affidavit affirmed by Kuok Khoon Hwong on 10.8.1998, the Petitioner had averred as followed:
>
> > 63. There is no evidence that the Liquidators have taken any steps towards investigating the various wrong doings by David Kuok which I had outlined to them on or about 12.5.1995. In particular, Tien Ik Enterprises hold all the shares in one Tanjong Tin Dredging (M) Sdn Bhd and to the best of my belief this company owned immovable properties in Tualang in the state of Perak. Investigation should be conducted to see and determine these immovable properties, if any. ...
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> 6. In reply to the aforesaid, the Liquidators had affirmed an affidavit on 25.8.1998 stating, in particular, at paragraph 55 therein, the following:
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> > 55. In respect of the Petitioner's belief that Tanjong Tin Dredging (M) Sdn Bhd ("TTD") own immovable properties in Tualang, the Liquidators have conducted investigation on the same and the results of such investigation do not show the existence of such properties. This is also reflected in the results of a company search conducted on TTD. Now shown and produced to me are the results of the Company Search conducted on TTD and are hereby marked and exhibited herein as "GWN-15".

7. The learned High Court Judge had accepted the explanation by the Liquidators above. In his grounds of judgment His Lordship states thus:

At p. 6

Complaint No. 10 was that Tanjong Tin Dredging (Malaysia) Sdn Bhd, a wholly owned subsidiary of Tanjong PLC, owned immovable properties in Tualang, in the State of Perak, and David had asked the third, fourth and fifth respondents to give these to him.

Peter avers that there is no evidence that the Liquidators have taken steps to investigate these complaints, in particular complaints No. 9 and 10.

... As to complain No. 10, they [the Liquidators] say that the investigation conducted by them does not show the existence of immovable properties in Tualang Tin Dredging (Malaysia) Sdn Bhd and they exhibit the results of a company search in further support of the fact ...

At p. 7

... Peter's response to the liquidators' explanation is to disbelieve the explanation. He maintains, I think as a matter of belief, that the liquidators never made any meaningful attempts to investigate his complaints other than to conduct a company search ...

At p. 9

... My finding on the matter of the complaints is simply this. By affidavit, Peter puts his case against the liquidators as that there is no evidence that they have taken steps to investigate his complaints Nos. 9 and 10. The liquidators have shown that they have looked into and followed up on the complaints as far as circumstances permitted, and have resolved some of them. (emphasis added).

At p. 27 to 29

... There is an instance in the petitioners' written submission of an allegation made contrary to revealed facts. It concerns the immovable allegation made contrary to revealed facts. It concerns the immovable properties allegedly owned by Tanjong Tin Dredging (M) Sdn Bhd in Tualang, Perak, a matter about which I have made mention. The matter is raised in paragraph 63 of Peter's main affidavit, where Peter says to the effect that there is no evidence that the liquidators have taken any steps to

investigate David's alleged wrongdoings, including steps to determine the existence of such lands. In paragraph 55 of their main affidavit, the liquidators say that they have conducted an investigation but it did not show the existence of such properties …

Annexed hereto and marked exhibit"A-2" is a true copy of the Grounds of Judgment by the learned High Court judge,

**[31]** The removal application was based on four grounds as stated earlier. With regard to the ground of failure to exercise duty to investigate the affairs of the companies the appellant, through Kuok Khoon Hwong, gave to the liquidators a list dated 12 May 1995 of twelve complaints, mainly of alleged wrongdoings by the 2nd respondent. Complaint no. 10 was that TTDM owned the Tanjong Tualang lands and the 2nd respondent asked the 3rd, 4th and 5th respondents to give these lands to him.

**[32]** The liquidators conducted a land search and it did not reveal that TTDM owned the Tanjong Tualang lands. Instead, the land search showed that the registered owner of the Tanjong Tualang lands was at all material times Tanjong Tin Dredging Limited. The liquidators said that the investigation conducted by them did not show the existence of immovable properties in Tanjong Tualang belonging to TTDM and they exhibited the results of a company search in further support of the fact. In his judgment the learned High Court judge held that the liquidators have shown that they have looked into and followed up on the complaints as far as circumstances permitted.

**[33]** The issue relating to the Tanjong Tualang lands is one of the twelve complaints raised by the appellant to the liquidators which has been considered by the learned High Court Judge. The issue for determination by the High Court then was whether the liquidators had reasonably investigated the matter at the material time of the complaint. As such the fresh evidence sought to be adduced would, in our view, have no determining influence on the learned High Court decision as it would not detract from the finding that the liquidators had indeed discharged their duties in investigating the same. Furthermore, TTDM is not one of the companies in liquidation. The removal applications involved four companies. The fresh evidence sought to be adduced only

A concerned one of the four companies, TIESB, which owned shares in TTDM which in turn beneficially owned Tanjong Tualang lands.

**[34]** In our view the appellant's application did not satisfy the
B conditions stated under r. 7(3A) of the Rules of Court of Appeal 1994. We therefore found that there was no merit in the appellant's application before us to adduce the fresh evidence and we had accordingly dismissed the application with costs.

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